SUPREME COURT, U.S.
FILED
OCT 11 2001
OFFICE OF THE CLERK

No. 01-431

IN THE
Supreme Court of the United States

DALE M., by his mother and next friend, ALICE M.,

Petitioners,

v.

BOARD OF EDUCATION OF BRADLEY-BOURBONNAIS HIGH SCHOOL DISTRICT NO. 307, JERRY SIKES, WILLARD DEWITT, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

JOHN A. RELIAS*
THOMAS KOUTSOUVAS
FRANCZEK SULLIVAN P.C.
Attorneys for Respondents
Suite 3400
300 South Wacker Drive
Chicago, Illinois 60606-6785
(312) 986-0300

* *Counsel of Record*

169926

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Page

Table of Cited Authorities ii

Reasons for Denying the Writ 1

I. The Decision Below Does Not Raise The Question Presented By The Petition 1

II. The Decision Below Does Not Present A Conflict 3

III. This Case Does Not Have Far Reaching Implications For Persons Entitled To Special Education Services Under The Individuals With Disabilities Education Act 7

Conclusion 8

TABLE OF CITED AUTHORITIES

Page

Cases:

Burke County Bd. of Educ. v. Denton, 895 F.2d 973 (4th Cir. 1990) 3

Independent Sch. Dist. No. 284 v. A.C., 258 F.3d 769 (8th Cir. 2001) 4, 5, 6

Kruelle v. New Castle County Sch. Dist., 642 F.2d 687 (3d Cir. 1981) 3

McKenzie v. Smith, 771 F.2d 1527 (D.C. Cir. 1985) 3, 4

Springer v. Fairfax County Sch. Bd., 134 F.3d 659 (4th Cir. 1988) 5

Tennessee Dep't of Mental Health & Mental Retardation v. Paul B., 88 F.3d 1466 (6th Cir. 1996) 3

United States v. Johnson, 268 U.S. 220 (1925) 7

Watt v. Alaska, 451 U.S. 259 (1981) 7

Rule:

United States Supreme Court Rule 10 ..... 3, 7

REASONS FOR DENYING THE WRIT

I.

THE DECISION BELOW DOES NOT RAISE THE QUESTION PRESENTED BY THE PETITION

The petition is based entirely on the proposition that the Seventh Circuit held that disabled students may be entitled to placement in residential schools under the Individuals With Disabilities Education Act ("IDEA") only if their disabilities are "cognitive," rather than "emotional" in nature (*See* Petitioner's Brief at i, 2, 13, 24-25). This is pure error. Such a holding is nowhere stated in the Seventh Circuit's decision. Furthermore, the Seventh Circuit recognized that the IDEA allows for the provision of special education and related services in a residential setting to non-cognitively disabled students. In this regard, it stated that:

> It is true that Dale has psychological problems that interfered with his obtaining an education, even though he has no learning disability. . . And the statute refers explicitly to 'psychological services' as one type of 'related services' that the statute may require a school district to pay for if, without them, the disabled child. . . cannot obtain an education. *But the Elan school does not provide psychological services for Dale.* For him all it provides is confinement. (Emphasis added).

Dale M. v. Board of Educ. of Bradley-Bourbonnais High Sch. Dist. No. 307, 237 F.3d 813, 816-817 (7th Cir. 2001). In reference to the reviewing administrative law judge's

decision in favor of the School District, the Seventh Circuit similarly observed that:

> He could find no evidence that Elan provided a superior educational experience for Dale to the [School District's program], *let alone any treatment for his 'conduct disorder' or his depression and substance abuse* . . . (Emphasis added).

Dale M., 237 F.3d at 815.

From this language, it is evident that the Seventh Circuit did not establish a categorical distinction between students with cognitive disabilities and those with non-cognitive disabilities. It instead reached the narrow conclusion that the particular residential school selected for Dale was inappropriate because it did not provide him with any services that were related to his disabling condition. Had the Elan school offered services tailored to address Dale's psychological and other needs arising from his disability, rather than serving only as a holding pen, the Seventh Circuit's analysis leaves no doubt that it could have been an appropriate educational placement. This, however, was not the record before it.

II.

THE DECISION BELOW DOES NOT PRESENT A CONFLICT

While neither controlling nor fully measuring this Court's discretion, compelling reasons for granting a writ of certiorari include a conflict between courts of appeals on an important matter, or a decision by a court of appeals on an important federal question that conflicts with a decision of this Court. *Sup. Ct. R. 10.* Neither of these reasons support Petitioners' request in this case. Petitioners do not allege a conflict between the Seventh Circuit's decision and a decision of this Court. They do, however, contend that the criteria applied by the Seventh Circuit for assessing the appropriateness of Dale's placement at the Elan School are at odds with the criteria applied by other circuits with respect to residential placements (Petitioners' Brief at 12, 16). This is not so.

Courts of appeals have now repeatedly stated that the IDEA entitles disabled students to support services, including placement in residential facilities, if those services are a "necessary predicate for learning" and are not "a response to medical, social or emotional problems that are segregable from the learning process." *See, e.g., Tennessee Dep't of Mental Health & Mental Retardation v. Paul B.*, 88 F.3d 1466 (6th Cir. 1996); *Burke County Bd. of Educ. v. Denton*, 895 F.2d 973 (4th Cir. 1990); *McKenzie v. Smith*, 771 F.2d 1527 (D.C. Cir. 1985); *Kruelle v. New Castle County Sch. Dist.*, 642 F.2d 687 (3d Cir. 1981). In recognition of this standard, the Seventh Circuit concluded that Dale's placement at the Elan school was not a "necessary predicate for learning," but rather "a response to medical, social or emotional

problems that are segregable from the learning process." *Dale M.*, 237 F.3d at 817-818. Consequently, it did not articulate a new or different standard for assessing the appropriateness of residential placements under the IDEA.

The petition relies primarily on the Eighth Circuit's decision in *Independent Sch. Dist. No. 284 v. A.C.*, 258 F.3d 769 (8th Cir. 2001). This decision does not evince a circuit split because it differs only in outcome, and not in the criteria applied with respect to the residential placement issue. In *A.C.*, the Eighth Circuit stated that "the IDEA requires a state to pay for a disabled student's residential placement if the student, because of his or her disability, cannot reasonably be anticipated to benefit from instruction without such a placement." *A.C.*, 258 F.3d at 774. It characterized this standard as an alternative wording of the same test applied by the Seventh Circuit below: whether residential placement is necessary for educational purposes, or whether it is a response to problems that are segregable from the learning process. *A.C.*, 258 F.3d at 774 (*citing McKenzie v. Smith*, 771 F.2d 1527 (D.C. Cir. 1985)).

Although the Eighth Circuit took issue with the Seventh Circuit's suggestion that disability related problems are separable from the learning process if they are not "primarily educational," the factual basis for each decision illustrates that they do not involve irreconcilable interpretations of the IDEA. While in school, A.C. exhibited severely inappropriate behavior, including classroom disruption, cursing and insubordination. She was suspended from school for this behavior on only her third day. *A.C.*, 258 F.3d at 771-772. A.C. was also hospitalized three times for threatening or attempting suicide. *A.C.*, 258 F.3d at 771-772. For these reasons, all of the school district's staff that were assigned

to A.C.'s case supported her mother's efforts to place her in a residential facility. *A.C.*, 258 F.3d at 772. The school district in A.C. was therefore in the untenable position of defending a position at odds with the initial recommendations of its own staff.

In contrast, Dale had success on every single day in which he attended the therapeutic day school program offered by the School District. *Dale M.*, 258 F.3d at 814. He completed all of his schoolwork, received good grades, and was well behaved. *Dale M.*, 258 F.3d at 814. As acknowledged by his mother during the first state-level administrative hearing, "there wasn't a problem at the school one day." Moreover, Dale was never removed from class as a result of his behavior.[1] The School District's staff therefore concluded that Dale did not require a residential program in order to succeed academically. *Dale M.*, 258 F.3d at 815. The Eighth Circuit implicitly recognized the legitimacy of this outcome for students like Dale when, in reference to a case involving a conduct disordered student with identical behavior (*i.e.*, theft, drug and alcohol use, and truancy), it stated that "[w]e also think it unlikely that Congress meant for the IDEA to require states to provide a home away from home for students who simply make bad choices, even if those choices cause them to fail in school." *A.C.*, 258 F.3d at 775 (citing *Springer v. Fairfax County Sch. Bd.*, 134 F.3d 659, 664 (4th Cir. 1988)).

Perhaps the most crucial component of the Eighth Circuit's holding was its recognition that A.C. was not placed

---

1. Petitioners throughout their brief falsely insist that the School District's primary goal for Dale's education was his exclusion from school.

in a residential setting solely for the purpose of confinement, but also in order to address her psychological problems:

> Taken as a whole . . . the evaluator's testimony suggests that a residential placement is necessary in order to correct A.C.'s behavioral and emotional problems, not just to keep her off the streets or force her to sit down with a tutor . . . It would be one-sided, therefore, to say that mere confinement was the evaluator's reason for recommending a residential placement. ***An independent and sufficient reason for that recommendation was to provide treatment for a psychological problem*** that has prevented A.C. from making acceptable academic progress. (Emphasis added).

A.C., 258 F.3d at 778. In contrast, Dale was not placed at the Elan School to receive treatment for his psychological problems, and received no such treatment while there. The Seventh Circuit noted in this regard that "[t]he Elan School does not offer psychiatric or other medical treatment for substance abuse or depression." *Dale M.*, 237 F.3d at 814-815. Similarly, Dale's mother admitted at the first state-level administrative hearing that she placed him at the Elan school for the purpose of obtaining his release from jail. *See Dale M.*, 237 F.3d at 814. By resting its holding on the complete disconnect between Dale's underlying problems and the services (or lack of) offered at the Elan school, the Seventh Circuit clearly indicated that it could have found in Petitioners' favor had these facts been otherwise.

At bottom, then, Petitioners come to this Court seeking error correction. But, as this Court has long held, it does not grant certiorari to review evidence and discuss particular

facts, *United States v. Johnson*, 268 U.S. 220, 227 (1925), because its "certiorari jurisdiction is designed to serve purposes broader than the correction of error in particular cases." *Watt v. Alaska*, 451 U.S. 259, 275 (1981) (Stevens, J., concurring). This Court's rules similarly provide that a "petition for writ of certiorari is rarely granted when the asserted error consists of a . . . misapplication of a properly stated rule of law." *Sup. Ct. R. 10.* Consequently, review by this Court is unnecessary.

III.

THIS CASE DOES NOT HAVE FAR REACHING IMPLICATIONS FOR PERSONS ENTITLED TO SPECIAL EDUCATION SERVICES UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

Petitioners argue that the Seventh Circuit "would constrict the IDEA so that the most severely disabled children would once again be denied services." Yet as already set forth, the Seventh Circuit held only that the Elan school was not an appropriate placement for Dale because he was sent there for the sole purpose of avoiding incarceration, and, even if that were not so, because it did not offer him a single service to address the apparent roots of his out of school misconduct (*See* Reasons For Denying The Writ, at I). By focusing as it did on the Elan school's incapacity for tackling Dale's problems with any tool other than the blunt hammer of confinement, the Seventh Circuit did not foreclose the possibility that another residential school could have been appropriate for him. To the contrary, it confirmed the propriety of such an outcome in cases in which the institution was equipped to provide services in addition to "twenty four hour supervision in a locked unit." *Dale M.*, 237 F.3d at 818.

Consequently, rather than categorically denying disabled students like Dale services, the Seventh Circuit merely held, as have all other courts to address the issue, that a residential school should be equipped to address the problems that ostensibly land students there in the first place in order for the taxpayer to bear that considerable expense.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JOHN A. RELIAS*
THOMAS KOUTSOUVAS
FRANCZEK SULLIVAN P.C.
Attorneys for Respondents
Suite 3400
300 South Wacker Drive
Chicago, Illinois 60606-6785
(312) 986-0300

* *Counsel of Record*